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OCTOBER TERM, 1968

FREDERICK T. ZUBER, ET AL., *Petitioners*,

v.

RUSSELL ALLEN, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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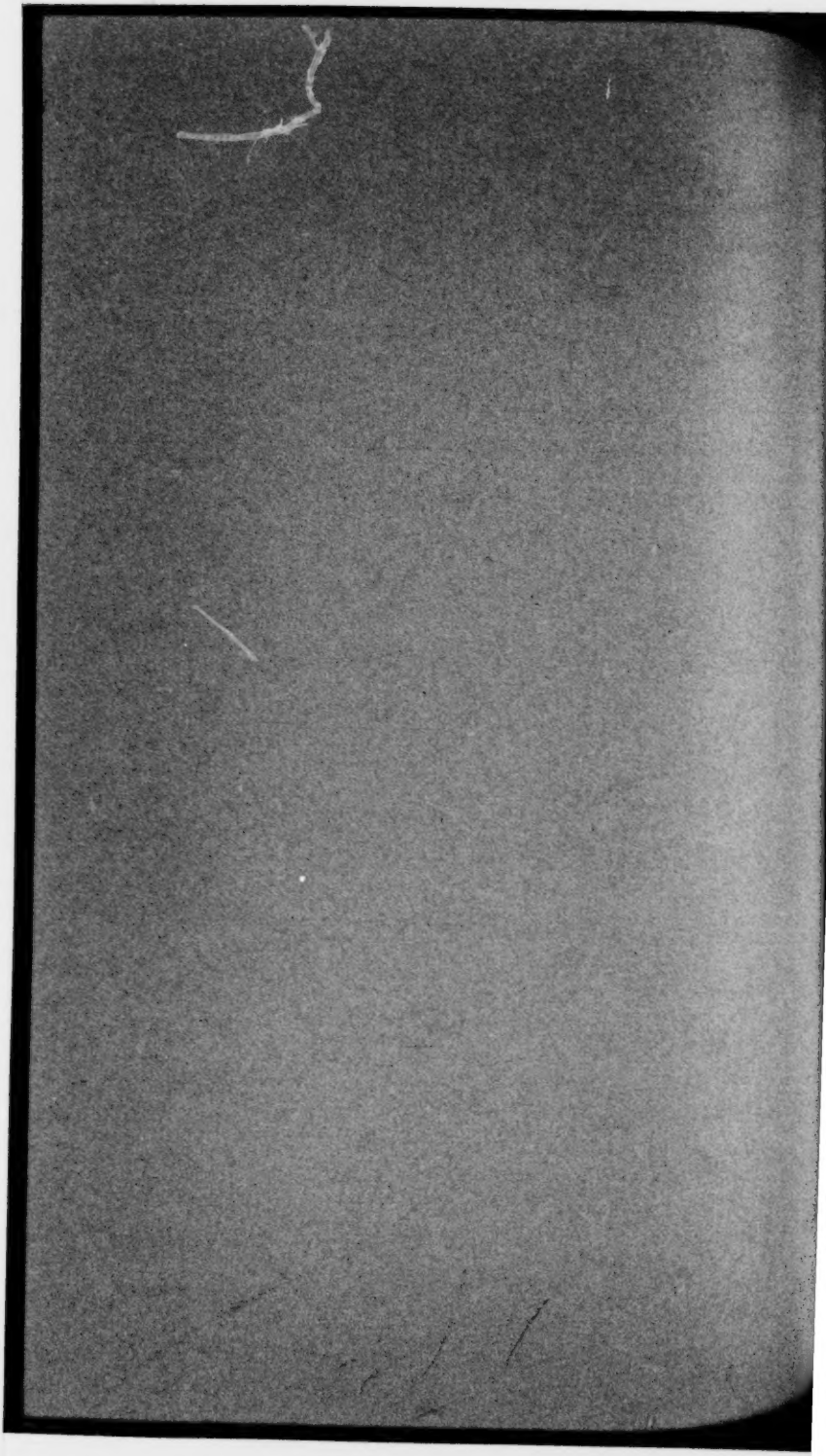

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The State of Rhode Island and Providence Plantations, hereinafter referred to as Rhode Island, pursuant to Rule 42 of the Rules of this Court, urges that the petition of Frederick T. Zuber, et al., for a writ of certiorari be granted. The pertinent facts, the questions presented for review, and the jurisdictional requisites are set forth in the petition itself and are adopted herein. The opinions below and the relevant statutory and regulatory provisions are printed as an appendix to that petition.

INTEREST OF THE AMICUS CURIAE

Virtually all dairy farmers whose farms are located within the State of Rhode Island deliver their milk to handlers serving the Massachusetts-Rhode Island Milk Marketing Area, and are therefore eligible for the nearby price adjustment invalidated by the decision below.[1] These farmers, 178 in number, sold some $4,400,000 worth of milk during the year ending November, 1968.

Rhode Island producers have historically realized a price substantially higher in relation to more distant producers than can be accounted for by advantages resulting from the cost of transportation and handling. In his decision to institute regulation in the Southeastern New England markets in 1958,[2] the Secretary recognized the continued economic viability of this long standing price relationship and consequently included a farm location adjustment in his Southeastern New England milk order promulgated in that year. When the Southeastern order was subsequently merged in 1964 with several others into the Massachusetts-Rhode Island Milk Order, the Secretary again determined that inclusion of a nearby differential price adjustment would be appropriate in view of the "... customarily somewhat higher values, above those which normally reflected transportation costs, [which] attached to milk produced near the principal consumption centers as compared to the market value of milk

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[1] See 7 C.F.R. § 1001.72(a), directing payment of the $.46 per hundredweight nearby differential to "all producers located in the State of Rhode Island."

[2] See 23 Fed. Reg. 8225, 8236, October 24, 1958.

produced in the more distant areas of the milkshed."[3]

The continued economic existence of Rhode Island's many producers is directly threatened by the decision below. Ignoring customary pricing practices and equitable considerations, the decision takes vast amounts of money from farmers who have long depended on receipt of the differential and pays them, as a windfall, to producers who have never expected to receive them, and who have long supported orders including the differential. The decision altogether destroys a pricing relationship which has been an accepted fact of life for all sectors of the dairy industry for more than half a century. In the process, by suddenly and drastically reducing the income of Rhode Island's producers, especially at a time of serious inflationary trends in the national economy, the decision threatens to eliminate a substantial portion and seriously harm all of Rhode Island's dairy farming population. The interest of the State is consequently apparent.

REASONS FOR GRANTING THE WRIT

The State of Rhode Island concurs with the reasons stated in the petition itself, as well as those advanced in the amicus curiae briefs filed on behalf of the State of Connecticut and the Commonwealth of Massachusetts. It suggests in addition that the following considerations seem to lie at the heart of the controversy.

Contrary to the holding of the court below in *Blair* v. *Freeman*[4] and *Zuber* v. *Allen*,[5] Congress did not

[3] See App. 14a of Petition, 29 Fed. Reg. 11205, 11213, August 4, 1964.

[4] 370 F.2d 229, at 236-237 (D.C. Cir. 1966).

[5] 402 F.2d 660, at 663 (D.C. Cir. 1968), App. 34a-35a.

intend, in including the phrase "irrespective of the uses made of such milk by the individual handler to whom it is delivered" in § 608c(5)(B)(ii) of the Act,[6] to prohibit the Secretary's consideration of historic or potential fluid utilization patterns in determining adjustments to uniform prices payable to producers. Rather, it intended by this phrase to make clear the Secretary's authority to disregard individual handler utilization levels in determining uniform prices to be received by producers under marketwide pooling plans. Moreover, contrary to the narrow view taken by the court below, the complete history of the milk order portion of the Act demonstrates that the phrase "volume, market and production differentials customarily applied by the handlers subject to the order"[7] was designed to enable the Secretary, in adjusting uniform minimum prices, to employ, in regional milk orders promulgated by him, legitimate business practices existing at the commencement of regulation, and consequently empowers him to employ differentials of the kind at issue in the instant case.

1. The Words "Irrespective of the Uses Made of Such Milk by the Individual Handler to Whom It Is Delivered" Set Forth in the Agricultural Marketing Agreement Act Were Intended by Congress To Enable the Secretary Effectively To Regulate Individual Handlers Under Marketwide Pooling Plans.

The Court of Appeals for the District of Columbia, in the cases of *Blair* v. *Freeman* and *Zuber* v. *Allen*, has held that the clause "irrespective of the uses made of such milk by the individual handler to whom it is

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[6] 7 U.S.C. § 608c(5)(B)(ii), App. 4a.

[7] 7 U.S.C. § 608c(5)(B)(i) and (ii)(a), App. 3a-4a.

delivered" contained in § 608c(5)(B)(ii) of the Act,[8] rigorously "forbids" the Secretary from in any way considering, in promulgating adjustments to uniform prices payable to producers, ". . . the use to which the milk of a particular producer or class of producers is put, historically or potentially. . . ."[9] In fact, however, this clause is designed to enable the Secretary, in determining prices payable to producers under a marketwide pooling plan, to disregard individual handlers' fluid utilization levels. The clause consequently performs a far different task from that assigned it by the court below.

Section 608c(5)(A)[10] of the Act authorizes the Secretary to establish what is called a "classified" pricing plan, under which all milk sold by the handlers serving a given milk marketing area is first classified according to the use in which it is marketed (e.g., fluid (bottled), cream or butter) by them. Each handler is then charged varying class prices, depending on the respective uses in which such handler has sold his milk.

Section 608c(5)(B)[11] deals, on the other hand, with the distribution to producers of the proceeds resulting from the handlers' payments of class prices. Under that Section the Secretary "pools" all monies payable to a group or groups of producers for their milk, arriving at uniform minimum prices payable to all producers in the designated group or groups by a "blend-

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[8] 7 U.S.C. § 608c(5)(B)(ii), App. 4a.

[9] *Blair* v. *Freeman*, 370 F.2d 229, at 237; *Zuber* v. *Allen*, 402 F.2d 660, at 663.

[10] 7 U.S.C. § 608c(5)(A), App. 3a.

[11] 7 U.S.C. § 608c(5)(B), App. 3a-5a.

ing" or averaging of the various use class prices paid. These prices are then subject to a number of specified adjustments based on economic and equitable considerations.

Two kinds of "pooling" are authorized by the Act. In an individual handler pool, each group of producers serving an individual handler in the market receives uniform prices reflecting the average or "blend" of the various use prices charged to that individual handler for milk sold by him in the various uses. In contrast, under a marketwide pooling plan, all handlers are in effect treated as one and all producers serving handlers who are in the regulated market receive uniform prices reflecting the average or "blend" of the various use prices charged to all the handlers covered by the regulation. Thus, as this Court stated in *Lehigh Valley Coop.* v. *United States*, § 608c(5)(B) authorizes:

> ". . . the establishment of either marketwide pools or individual handler pools. . . . [T]he latter require only that each handler pay uniform prices to all the producers from which he buys, but does not impose a uniformity requirement among the various handlers [such as is imposed by the former] . . . ." [12]

The term "irrespective of the uses made of such milk by the individual handler to whom it is delivered" in subsection 608c(5)(B)(ii) serves to emphasize the contrast between the individual handler pooling authority granted under subsection 608c(5)(B)(i) and the marketwide pooling authority granted under subsec-

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[12] *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), at 82 (Footnote 8).

tion 608c(5)(B)(ii). This descriptive role becomes apparent when we consider that while, on the one hand, individual handler pooling operates to provide each group of producers supplying each individual handler with uniform minimum prices different from other groups of producers supplying other handlers because of the differing shares of the fluid use market obtained by the various handlers in the market, marketwide pooling, on the other hand, operates to provide uniform minimum prices to all producers "irrespective" of the use classes in which the individual handlers' milk is sold. It further explains why the phrase appears in the subsection authorizing marketwide pooling and does not appear in the subsection authorizing individual handler pooling.

Moreover, and more importantly, in addition to clarifying the difference between individual handler and marketwide pooling, the phrase in issue explicitly lodges positive authority in the Secretary, in instituting marketwide pooling in regulated markets, to ignore those individual handler fluid utilization levels which in regulated individual handler pools and as well generally in unregulated markets are largely determinative of prices paid producers. When considered in the light of the concepts of the limits of governmental regulatory power of the day, it can be seen that the positive authority so granted was of an extremely controversial nature. It empowered the Secretary to provide, in marketwide pooling plans promulgated by him, for the transfer of the proceeds obtained in the marketplace from one handler's sale of milk to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied

another handler. In doing so, it enabled the Secretary to deprive high fluid use handlers[13] of a significant competitive advantage they possessed over their lower fluid use competitors in obtaining milk supplies.

This power was termed "equalization" by the affected handlers and attacked by them as violative of constiutional guarantees in the leading cases of *United States* v. *Rock Royal Co-op., Inc.*[14] and *H. P. Hood &*

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[13] At the time of the enactment of the legislation there were, and still are, different types of handlers. One example is the small proprietary handler whose business consists principally, if not entirely, of a local milk route in a given community. Almost 100% of the sales by this kind of handler are fluid use sales. Another type is the large handler serving fluid route sales in a number of communities, both wholesale and retail, and engaged in the manufacture of ice cream, butter and other dairy products throughout the entire area. These large handlers traditionally have had a substantial amount of fluid use sales, but also use a substantial portion of surplus milk for non-fluid sales. A third type is the handler whose business consists principally of the manufacture and sale of milk products, such as cheese, butter, ice cream and the like. This third type of handler at the time of the Act had, and even today has, almost no fluid milk sales. Since the institution of milk orders most, if not all, manufactured milk handlers in the Northeast have made a minimum amount of fluid sales for a minimum portion of the year sufficient only to qualify themselves for regulation under federal orders so that their producers will be entitled to share in blend prices. A much larger proportion of the milk produced in distant areas under the Massachusetts-Rhode Island Order goes to this latter type of handler than is the case with milk produced in nearby areas. (It should be noted, parenthetically, that, since characteristics such as evenness of production, accessibility and reliability are only important to the handler primarily selling milk in fluid use, distant producers selling to these manufactured milk handlers are not required through the year to provide as important value contributions as their nearby counterparts, who primarily serve fluid milk handlers.)

[14] 307 U.S. 533 (1939).

Sons, Inc. v. *United States*[15]. In both of those cases, this Court recognized the Congressional purpose in including the "irrespective of the uses . . ." phrase in the statute to be a central aspect of the primary legislative intent to authorize *regulation of handlers through marketwide pooling.* The Court found that the provision did not contravene the Constitution, and, in *Rock Royal,* held also that it did not preclude the Secretary's employment of differential provisions of the sort challenged in the present case, further suggesting in its discussion of the constitutionality of the equalization pool that it was precisely the fact that the Secretary was permitted to make adjustments to the uniform price reflecting "usual market variations" which disproved the handlers' claim that the marketwide pooling process violated due process.[16]

It is most anomalous that, at this late date in history, a provision intended to authorize the Secretary to limit the potentially disruptive effects of varying handler utilization levels in milk markets should be read now to have precluded a differential adjustment which is not now and never was disruptive in its effects, which does not depend on the individual handler's use of the milk delivered to him, which is economically legitimate and equitable as among producers serving the market, and which preserves one of those market variations whose preservation the *Rock Royal* Court felt was central to the constitutionality of the Act. Review by this Court of the decision below would therefore seem particularly appropriate to *amicus curiae.*

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[15] 307 U.S. 588 (1939).

[16] See 307 U.S. 533, at 567, 571-573. See discussion in *Cranston* v. *Freeman,* 290 F. Supp. 785, 805-06, App. 111a-114a.

2. The Price Adjustment in Issue Is a Market Differential Customarily Applied.

While the price adjustment at issue here is not proscribed by the phrase "irrespective of the uses made of such milk by the individual handler to whom it is delivered," the adjustment is as well within the Secretary's authority to promulgate "market . . . differentials customarily applied by the handlers subject to such order . . . ." [17] The considerations dictating such a conclusion are set forth in detail in the opinion of the United States District Court for the Northern District of New York in the case of *Cranston* v. *Freeman*,[18] and provide a significant contrast to the exclusive reliance of the court below on language contained in a single paragraph of the relevant Committee Reports.[19]

While it is true that pricing patterns favoring nearby producers were commonly in effect in milk markets at the time of enactment of the statutory language and that Congress in numerous ways gave indication of its intent that pricing arrangements evolved by cooperative associations and utilized in the Secretary's licensing programs in the period 1933-35 be continued under the 1935 amendments,[20] the colloquy cited by the *Cranston* court between Senators Murphy and Copeland[21] would seem perhaps most persuasive of Congress' intent to permit the Secretary to utilize

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[17] 7 U.S.C. § 608c(5)(B)(ii)(a), App. 4a.

[18] 290 F. Supp. 785 (N.D.N.Y. 1968), App. 73a.

[19] See *Zuber* v. *Allen*, 402 F.2d 660, 673, App. 54a-55a.

[20] See *Cranston* v. *Freeman*, 290 F. Supp. 785, 796-803, App. 94a-108a.

[21] *Cranston* v. *Freeman*, 290 F. Supp. 785, 799, App. 98a-100a. The colloquy appears at 79 Cong. Rec. 11139-11140, August 15, 1935.

nearby differential adjustments to the uniform price to producers.

As is clear from a reading of the discussion on the Senate floor, Senator Copeland was attempting to receive assurances from the bill's floor manager, Senator Murphy, that producers nearby a regulated market could receive a higher price, beyond transportation costs, despite marketwide pooling. Senator Murphy answered him affirmatively by pointing out the language of the bill permitting differentials customarily paid and stating that the language adopted "the present practice of business."[22] A fair reading of Senator Murphy's remarks would be that, if a nearby adjustment accurately reflected a normal practice of business in existence at the time of institution of regulation, the Secretary could employ it under the ". . . differential . . . customarily applied . . ." language of the statute. Since the nearby differential at issue here accurately reflects a normal practice of business prevalent in the New England markets over at least the past five decades, it would appear to fall comfortably within the Secretary's statutory authority as described by Senator Murphy.

On the House floor, a Vermont Representative presented the 1935 milk regulation amendments to the AAA to his fellow members. He stressed that the "plans" permitted by the legislation were the same devices which had been used by cooperative associations over many years prior to 1935.[23] Moreover, he con-

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[22] 79 Cong. Rec. 11140.

[23] See 79 Cong. Rec. 9602; June 18, 1935, remarks of Rep. Plumley.

cluded his remarks with an extensive discussion of the chaos then prevailing in the Boston milk market, as a result of a court decision holding the Boston milk license invalid. His statements include no suggestion that the nearby differential arrangements under the license were illegal, or otherwise undesirable, nor was there any indication given by him that the 1933 and 1934 licenses' provisions for higher prices to nearby farmers could not be retained under the new regulatory terminology. On the contrary, Representative Plumley's comments indicate quite simply that the new amendments were intended to permit restoration of the licensing arrangements, albeit under the new "order" terminology.[24]

That the differential challenged here has been customarily applied in the New England markets is incontrovertibly a matter of record. That it falls within the provision for "volume, market and production differentials customarily applied by the handlers subject to the order," intended by Congress to encompass "the present practice of business", is equally clear when the full history of the statute and the conditions surrounding its enactment are taken into account. Therefore, this Court should grant the petition of the affected nearby farmers and reverse the decision below.

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[24] See 79 Cong. Rec. 9603-9604.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari of Frederick T. Zuber, et al., be granted.

Respectfully submitted,

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